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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

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No. 639  
—

ESTATE OF MORTIMER B. FULLER, DEC. KATHRYN S. FULLER,  
EDWARD L. FULLER, MORTIMER B. FULLER, JR., and  
HENRY S. FULLER, Executors, *Petitioner*,

v.

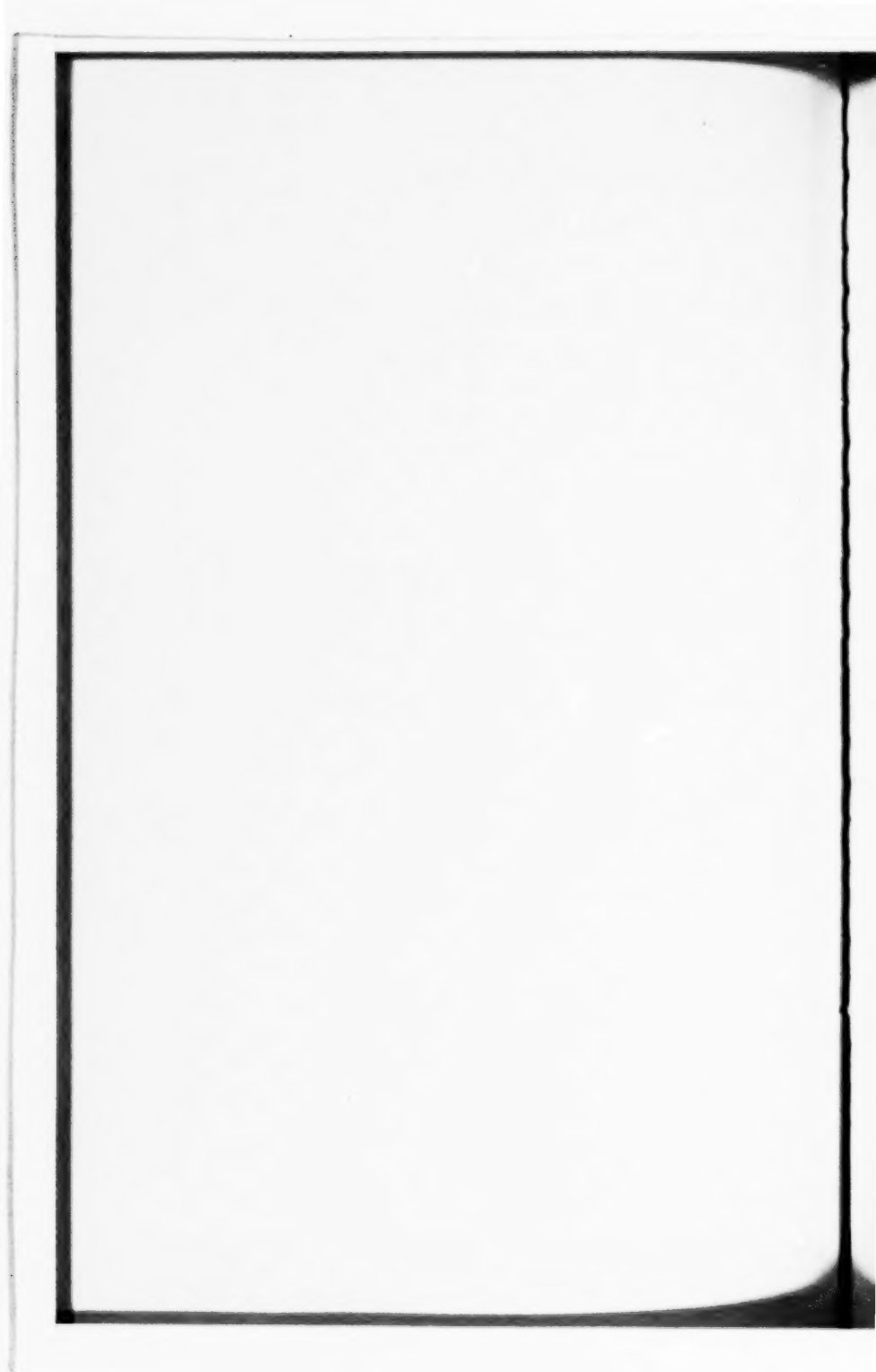
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, AND BRIEF IN SUP-  
PORT THEREOF.**

✓  
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## INDEX.

	Page
Petition for a Writ of Certiorari.....	1
Nature of the Controversy.....	2
Statement of Facts . . . . .	2
Reasons for Granting the Writ.....	4
Table of Cases and Authorities Cited.....	6
Brief in Support of Petition:	
Citation to Opinions Below.....	7
Jurisdiction . . . . .	7
Statement of the Case.....	2-4
Specification of Errors.....	8
Statutes and Regulations Involved.....	1a
Argument:	
1. The holding that the executors acquired no duty under the will or the laws of Pennsylvania.....	8
2. The direct conflict with <i>Bingham's Trust v. Commissioner</i> . . . . .	12
3. The failure to find ultimate facts.....	13
4. The use of losses as a test under the statute... ..	14
5. The substitution of speculation for the facts shown . . . . .	15
Conclusion . . . . .	17
Appendix:	
Statutes and Regulations Quoted.....	1a
Docket Entries . . . . .	5a
Findings of Facts and Opinion of the Tax Court....	7a
Last Will and Testament of Mortimer B. Fuller (excerpts) . . . . .	18a
Statement of Evidence . . . . .	21a
Per Curiam Decision of Circuit Court of Appeals for Third Circuit . . . . .	31a

## CASES CITED.

	Page
Alston, Caro duB v. Commissioner, 8 T. C. 61.....	10
Armstrong, Estate of v. Commissioner, 2 T. C. 731....	10
Bingham's Trust v. Commissioner, 323 U. S. 365	8, 12, 13, 14
Catanach's Estate, In Re, 273 Pa. 368, 117 A. 173....	11
Chandler v. Commissioner, 119 Fed. (2d) 623.....	16
Commissioner v. Church's Estate, 69 S. C. L. 322.....	9
Consolidated Edison Company of New York v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126..	15, 16
Cooke v. Commissioner, 78 Fed. Supp. 519.....	14
Crocker v. U. S., 240 U. S. 74, 50 L. Ed. 533.....	14
Dalton v. Bowers, 287 U. S. 404, 53 S. Ct. 205, 77 L. Ed. 389 .....	10
Donnelly v. Commissioner, 31 B. T. A. 577.....	10
Foran v. Commissioner, 165 Fed. (2d) 707.....	17
Frederick v. Commissioner, 2 T. C. 936.....	10
Galloway v. U. S., 319 U. S. 372, 395; 87 L. Ed. 1458, 1473 .....	15
Gillett's Estate, In Re, 130 Pa. Superior Court, 309, 197 A. 517 .....	12
Goldfield, City of v. Roger, 249 Fed. 39.....	14
Greene v. Commissioner, 141 Fed. (2d) 645.....	17
Highway Trailer Company v. Des Moines, 298 Fed. 71	14
Kendrick Coal & Dock Co. v. Commissioner, 29 Fed. (2d) 559 .....	14
Kent v. Commissioner, 170 Fed. (2d) 131.....	15
Lahman v. Burnes National Bank, 20 Fed. (2d) 897..	14
Lawton v. Commissioner, 164 Fed. (2d) 383.....	15
Letterle's Est., 248 Pa. 95.....	12
Leuder's Estate, In Re, 164 Fed. (2d) 128.....	15
Loewers Estate, In Re, 263 Pa. 95.....	12
Nagel's Estate, In Re, 305 Pa. 36, 156 A. 309.....	13
Parrott v. Commissioner, 1 B. T. A. 1, aff'g in Noel v. Parrott, 15 Fed. (2d) 669, cert. denied 273 U. S. 754 .....	16
Plant v. Commissioner, 76 Fed. (2d) 8.....	10
Powell's Estate, In Re, 340 Pa. 404, 17 A. 391.....	12
Tatt v. Commissioner, 166 Fed. (2d) 697.....	17
Thacher v. Lowe, 288 Fed. 994.....	14

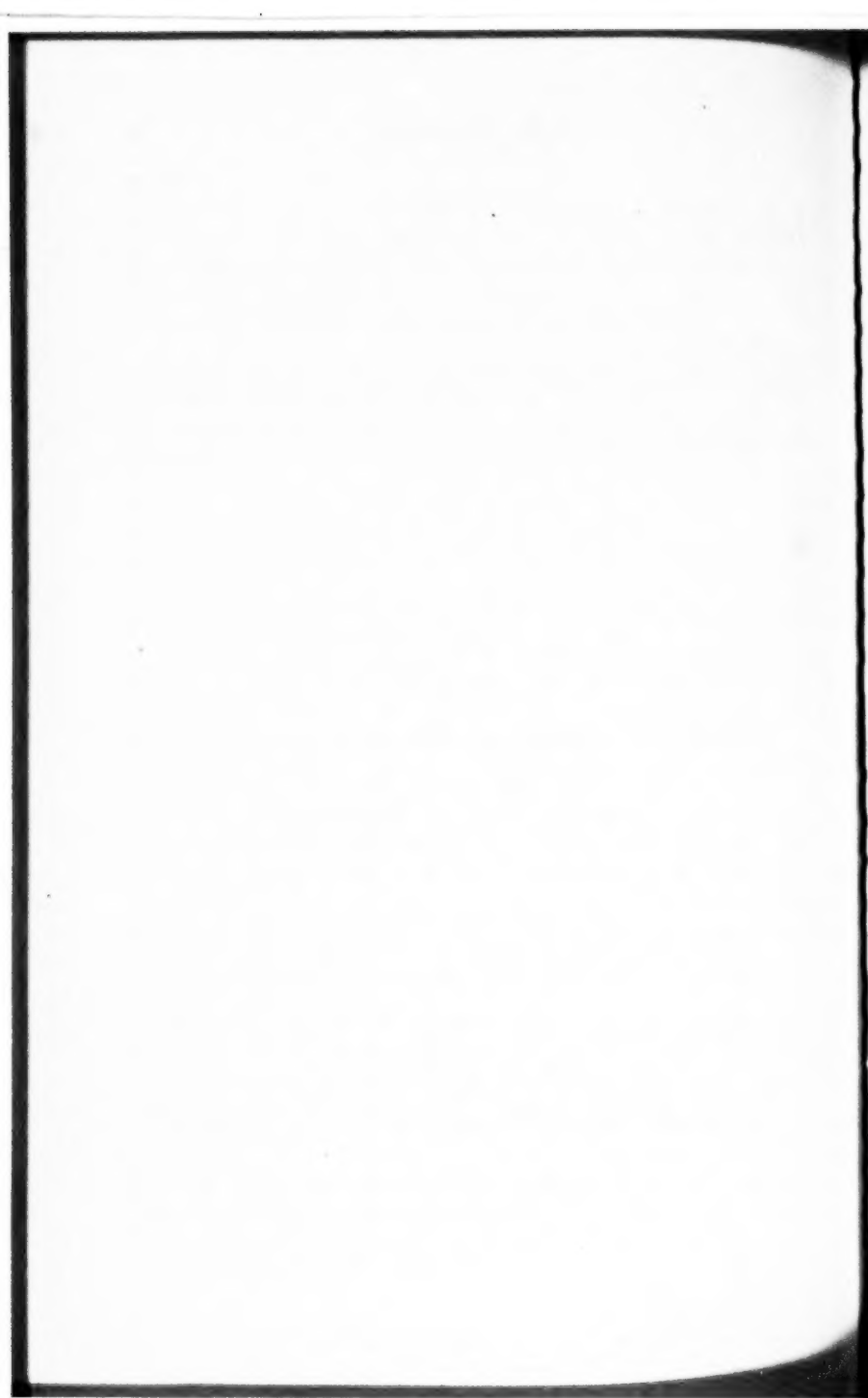
# Index Continued.

iii

	Page
U. S. v. Britten, 161 Fed. (2d) 921.....	10
U. S. v. Pyne, 313 U. S. 127, 61 L. Ed. 893.....	14
Van Worst, Exec. v. Commissioner, 59 Fed. (2d) 677..	15

## OTHER AUTHORITIES CITED.

Corpus Juris Secundum, Vol. 31.....	16
General Counsel's Memo, 21,103, 1939-1 Cumul. Bul. 164 .....	14
Restatement, Trusts, sec. 170.....	16



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HENRY S. FULLER, Executors, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.**

---

The Estate of Mortimer B. Fuller, Deceased, (Kathryn S. Fuller, Edward L. Fuller, Mortimer B. Fuller, Jr., and Henry S. Fuller, Executors) respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the judgment of that Court entered in the above cause on December 13, 1948.

## NATURE OF CONTROVERSY.

This proceeding involves income taxes for the years 1942 and 1943 in the total amount \$33,624.62 (R. 7a) under section 23(a)(2) of the Internal Revenue Code (Appendix, p. 1a), which allows as a deduction all of the ordinary and necessary expenses incident to the management, conservation, or maintenance of property held for the production of income; and alternatively, section 23(a)(1) of said Code, allowing as deductions all of the ordinary and necessary expenses paid in carrying on any business.

The Tax Court (R. 17a) denied the deductions under both sections of the law and the Circuit Court of Appeals (R. 31a) affirmed in a *Per Curiam* decision of two lines.

## STATEMENT OF FACTS.

Petitioner is an Estate still in the period of administration. (R. 22a, 26a). Mortimer B. Fuller, of Scranton, Pennsylvania, died testate on September 7, 1931. He designated his widow, Kathryn S. Fuller, and his sons, Edward, Mortimer, Jr., and Henry, as executors and trustees under his will. (R. 18a). His gross estate included stocks and bonds valued at \$2,357,764.39,—chiefly 35,710 shares of International Salt Company (listed) and 2,119 shares of Genesee & Wyoming Railroad Company (unlisted), of both of which companies he was President. All of these two blocks, representing control of both companies, were pledged at decedent's death to banks and individuals as collateral on notes aggregating \$1,839,783.83 and remained so pledged during all times material here. At the end of the period involved, the Estate had reduced the secured debts to \$520,822.73. (R. 8a).

The family residence, known as Overlook, was inherited from decedent's father and was occupied by the entire family in separate homes at decedent's death and throughout the period involved. (R. 27a). By his will, decedent devised to his widow a life estate in Overlook and be-

queathed to her, for her life, all cattle, horses, equipment and appurtenances thereto. All of the residue of the estate, real, personal, and mixed, he left to the trustees, first to set aside a portion sufficient to produce an annual income to be applied to the maintenance and operation of Overlook and all things incident thereto, during the life of his widow. (R. 18a). Should the widow and all of the sons so desire, she and the trustees were to sell Overlook, the proceeds to be retained by the Trust Estate. After her death, should the sons so desire, the trustees could sell and distribute the proceeds to them or their heirs. The income on the balance of the entire Trust Estate was to be paid annually to the widow ( $\frac{5}{8}$ ths) and to each son ( $\frac{1}{8}$ th), during her life; and on her death the corpus and accumulated income were to be distributed to the said sons. (R. 19a).

Except for small cash legacies to servants, no distributions whatever had been made to and including the period under review. (R. 22a).

Overlook was a country estate of about 518 acres. The farming and dairy business was conducted under an employed superintendent and force. (R. 24a). Produce was sold both to the family and the public, the family paying the same price paid by the public, also paying all of their own domestic expenses. The records were kept carefully and farm assets and supplies kept segregated from residential items,—even to separate gasoline pumps. There were numerous buildings, some occupied by the help and one of which was rented to an outsider. (R. 25a).

No new buildings or facilities were added to the premises subsequent to decedent's death, except one chicken coop. (R. 29a). All receipts, including rent, were paid to the Estate and so reported for tax purposes. (R. 22a, Ex. 6, 8). In 1939, a portion of the realty was sold by the Estate and the proceeds were received and held by it. (R. 25a, Ex. 15). Maintenance expenses were curtailed until in one year

they were only a third of those paid during the decedent's life. (R. 28a).

Against receipts, the Estate paid a total of \$23,068.58 in 1942 and \$22,999.68 in 1943 on the farming operations alone, including the depreciation on equipment, and claimed the same as deductions itemized on the schedules attached to the tax returns. (R. 22a, Ex. 6, 8). The Commissioner disallowed the deductions.

The Estate appealed to the Tax Court on two grounds; first, that the payments were ordinary and necessary expenses paid for the management, conservation and maintenance of property held for the production of income as provided in section 23(a)(2) of the Internal Revenue Code; and, alternatively, as ordinary and necessary expenses paid in carrying on the business of farming, under section 23(a)(1) of that Code. (R. 7a).

In sustaining the Commissioner, the Tax Court made no ultimate finding whatever as to the alternative issue, and its finding on the first issue can be gathered only from the opinion.

The Estate appealed and the CCA-3 affirmed the Tax Court in a *Per Curiam* decision of two lines. (R. 31a).

### **REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.**

1. The decision of the Circuit Court of Appeals for the Third Circuit, in so affirming the decision of the Tax Court, disallowing the deductions under section 23(a)(2) of the Internal Revenue Code on the basis of technical title rather than the duty of executors, is in conflict with the decision of this Court in *Bingham's Trust*, 325 U. S. 365; 89 L. Ed. 1670.

2. The decision of the Circuit Court of Appeals, in affirming the decision of the Tax Court, which failed to make specific findings of ultimate facts, is in conflict with the decision of this Court in *U. S. v. Pyne*, 313 U. S. 127; 85 L. Ed. 1231.

3. The decision of the Circuit Court of Appeals, in denying deduction of compulsory expenses paid by an Estate for conservation of property held, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Plant*, 76 Fed. (2d) 8.

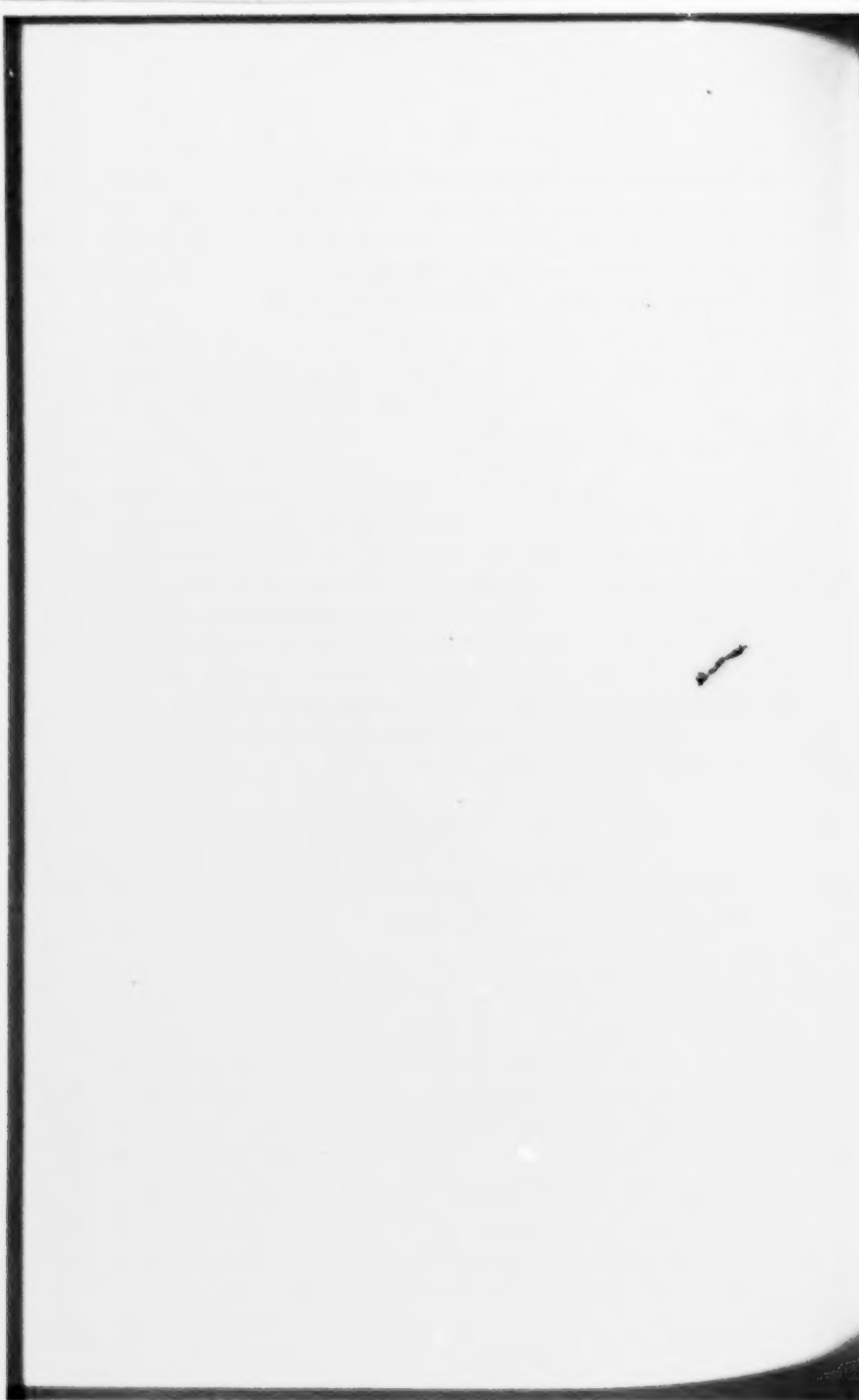
4. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the Tax Court as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the U. S. Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may seem proper.

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**BRIEF IN SUPPORT OF PETITION.**

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**OPINION BELOW.**

The opinion of the Tax Court (R. 7a) is reported at 9 T. C. 1069. The opinion of the Circuit Court of Appeals (R. 30a) was rendered December 13, 1948, and is reported at 171 Fed. (2d) 704.

**JURISDICTION.**

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code, section 347).

## **STATEMENT OF THE CASE.**

The principal facts are set forth in the petition at pages 2 to 4.

## **SPECIFICATION OF ERRORS.**

The Circuit Court of Appeals erred in affirming without comment the following errors of the Tax Court:

1. That Pennsylvania executors, who also were trustees and remaindermen, acquired no duty to manage, conserve and maintain real and personal property during the period of administration and life tenancy.

2. That such expenditures were not for the management and conservation of property held for the production of income under section 23(a)(2) of the Internal Revenue Code, in conflict with *Bingham's Trust v. Commissioner*, 323 U. S. 365.

3. In failing to make ultimate findings of facts as to either issue.

4. In considering losses as a test.

5. In indulging in speculation as to a purpose contrary to the direct evidence and against the presumption of regularity in the acts of fiduciaries and representatives of the courts.

## **STATUTES AND REGULATIONS INVOLVED.**

The statutes and regulations involved are set forth in full in the appendix, *infra*, page 1a.

## **ARGUMENT.**

### **1. The Holding That the Executors Acquired No Duty to Manage, Conserve and Maintain the Property.**

The erroneous premise upon which the Tax Court's entire decision rests is the finding (R. 13a) that "the decedent gave the executors (*sic*) no duty to manage, con-

serve, or maintain Overlook" and that "they acquired no jurisdiction over it \* \* \* under the laws of Pennsylvania." The Tax Court indulges in that refinement of technical titles which has so many times and even recently engaged the attention of this Court. *Commissioner v. Church's Estate*, 69 S. C. L. 322, 327 in dealing with the overruling of *May v. Heiner*, 281 U. S. 238, which had fixed a rule upon the test of formal legal title. Even that has been disregarded here as to the maintenance of undistributed personalty.

Consideration below centered on title to the realty, nowhere recognizing that there was still in the custody of the Estate, during the period of administration, substantial undistributed personalty of a character requiring immediate care. (R. 27a). This is the first and very apparent error.

Cattle, horses, hogs, chickens, crops and equipment must be sheltered and tended instantly and both the duty and responsibility rested with the Estate, at least until the personalty had been distributed. Had fences not been kept in repair and roving cattle caused damage to adjacent property before distribution, the Estate would have been answerable, not the legatee who had not received the property. Had there been no will, these expenses would have been compulsory upon the Estate during administration, meaning the executors. The trust had not been set up and could not be set up until the corpus was released from pledge, (R. 22a) and the life tenant did not yet have delivery.

But the premise also is erroneous in relation to the realty. Throughout, executors rather than the Estate were considered by the courts below. The tax entity is the Estate, not the executors or trustees. Sections 161, 162, Internal Revenue Code. (R. 1a). Tax deductions apply only to the tax entity, not to the individuals acting for the entity. During the period of administration, the Estate could act only through the executors. When they ceased

to act, the Estate would continue to act through the trustees. Whatever duty or power was given to the trustees by the will or the law necessarily applied to the executors during administration. The trustees were given the specific duty to incur the expenses. (R. 18a). The premise that the decedent gave no duty to the executors is specious and contrary to the evidence as well as the law.

Under the specific terms of the will (R. 18a), title to the remainder in the realty was in the trustees of the estate. Except for the life estates in the realty and the undistributed personalty, the Estate was given the large security holdings, the very first duty specified being the "maintenance and operation" of Overlook. (R. 18a). The trust could not be set up until the intended corpus was released from pledge and distributed to the trustees. (R. 25a). The Tax Court endeavors to make a distinction based upon the two representative capacities where, in tax law, there is no difference. The Tax Court has confused an executrix with the person acting as such, contrary to *U. S. v. Britten*, 161 Fed. (2d) 921; *Caro duB. Alston v. Commissioner*, 8 T. C. 61; *Garrett J. Donnelly v. Commissioner*, 31 B. T. A. 577; *Est. of J. Armstrong v. Commissioner*, 2 T. C. 731; *Walter A. Frederick v. Commissioner*, 2 T. C. 936. The distinction for tax purposes between heirs or beneficiaries from the estate or trust is as clear as that between a stockholder and his corporation. See *Dalton v. Bowers*, 287 U. S. 404, 410; 53 S. Ct. 205, 207; 77 L. Ed. 389.

Although the Tax Court cites *Henry B. Plant v. Commissioner*, 76 Fed. (2d) 8, in connection with a point upon which the parties stipulated, (R. 12a) it overlooked and is in conflict with Circuit Judge Augustus Hand's holding there that the life tenant was not entitled to receive the sums expended, that the expenditures in maintaining the property may have been as much for the benefit of the capital of the trust (which was the remainderman here) as

for the enjoyment of the life tenant, and the fact that the expenditures were compulsory.

The Estate from the start has dealt with the personality as its own rather than the widow's. Income from not only the operation of animals and equipment, but also from sales thereof, has been treated as Estate income. (R. 22a, 25a, Ex. 6, 8, 15). This is consistent entirely with the terms of the will, under which the widow was given only the use of the personality "for and during the term of her natural life." Under Pennsylvania decisions this continued and uniform construction of the will by all interested parties becomes the law of the case and controls. *In re Catanach's Estate*, 273 Pa. 368; 117 A. 173. The payment of expenses of maintenance and operation of this personality, therefore, is not only in accord with the specific directions of the will, but the law of the State.

The Overlook personality not only was still in the custody of the executors, but upon its distribution to the life tenant she would be required by Pennsylvania law \* to give

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\* Act of June 7, 1917, P. L. 447, sec. 23: Title 20 of Purdon's Pa. Stat. Ann.; Sec. 635:

"Whenever any person is or shall be entitled to the income from the proceeds of the sale of a decedent's real estate; and whenever any personal property, or the increase, profits, or dividends thereof, has been or shall hereafter be bequeathed to any person for life or for a term of years, or for any other limited period, or upon a condition or contingency; the executor or executors, administrator with the will annexed, trustee or trustees under such will, or trustee appointed by the orphans' court to make such sale of real estate, as the case may be, shall deliver the property so bequeathed to the person entitled thereto, upon such person giving security in the orphans' court having jurisdiction, in such form and amount as in the judgment of the court will sufficiently secure the interests of the person or persons entitled in remainder, whenever the same shall accrue or vest in possession. Should such person or legatee refuse or neglect, or be unable, to enter such security, the court may, upon petition of any person interested, including the owner of any subsequent interest, vested or contingent, in such proceeds of real estate, personal property, or the increase, profits, or dividends thereof, and upon due notice to

a bond for an accounting to the remaindermen. *Loewer's Estate*, 263 Pa. 517. Thereupon she would become a debtor to them. *In re: Gillett's Estate*, 130 Pa. Superior Court 309, 197 A. 517; *Powell's Estate*, 340 Pa. 404, 17 A. 391; *Letterle's Estate*, 248 Pa. 95. On her failure to give bond, they could have a trustee take over. The remaindermen here, as to both realty and personalty, were the trustees. All of this is in addition to the specific instructions in the will that the trustees (meaning the Estate, taxwise) should operate and maintain Overlook. The Tax Court's premise as to duty imposed by the decedent and that fixed by Pennsylvania law is erroneous.

**2. Direct Conflict With Bingham's Trust, 325 U. S. 365;  
89 L. Ed. 1670.**

The nearest approach to a specific holding below is the statement, buried in the opinion (R. 13a) "The expenses were not ordinary and necessary expenses of the estate (*sic*) under section 23(a)(2)." Here for the first time the Tax Court mentioned the tax entity rather than the executors or trustees.

*Bingham's Trust*, *supra*, is the leading case on section 23(a)(2). In the case at bar, jurisdiction and title to the realty only, though carelessly discussed, are the purported

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all persons interested, so far as such notice can reasonably be given, appoint a suitable person or corporation as trustee to receive and hold such proceeds of sale or personal property, invest the same in securities authorized by law, pay the income thereof, after deducting all legal charges, to the person entitled thereto; and, upon the termination of the trust, account for and pay to the persons entitled thereto the corpus of the trust fund, or transfer and deliver to them the securities in which it is invested, as the court may direct, after deducting all legal charges thereon. Such trustee shall enter such security as the court may direct. He shall not be an insurer of the trust fund, and shall be liable to the persons interested in the income or corpus of the trust fund only for such care, prudence, and diligence in the execution of the trust as other trustees are liable for."

bases for the conclusion reached. The *Bingham* decision, (325 U. S. at 373, 375) rests upon the duty to hold and conserve the property until final distribution, and it holds that any ordinary and normal expense incurred thereby is deductible under the section. In *Bingham*, the expenses had no direct relation to income production, being tax litigation expenses. In the case at bar, the expenses did directly produce income which was returned for tax purposes.

*Bingham* holds that expenses related to distribution are within the section. Our expenses not only produced income, but were for the conservation of real property ultimately to be sold by the Estate, part of which had been sold by it and all of the proceeds of the sale were and would be Estate income.

The expenses in the *Bingham* case were deemed compulsory under the legal duty of the trustees. Here they also had been directed by the specific terms of the will. Had they not been so disbursed, the life tenant and beneficiaries could have enforced their payment and, under Pennsylvania law, the executors would have been surchargeable had damage or loss resulted from their failure to make them. *In Re: Catanach's Estate, supra*; *In Re: Nagel's Estate*, 305 Pa. 36; 156 A. 309.

### 3. Failure to Find Ultimate Facts.

Nowhere in either the Findings of Facts or the Opinion below has there been any finding of the ultimate fact as to the alternative issue raised in the pleadings—"ordinary and necessary expenses paid in carrying on the business of farming."

Nowhere in the Findings of Facts has there been a finding, preliminary or ultimate, whether the expenses were "paid in the conservation, maintenance, or management of property held for the production of income," the ultimate fact under section 23(a)(2). Buried in the opinion is the statement that the expenses were not ordinary or

necessary expenses of the estate "under section 23(a)(2)." (R. 13a). This precisely is what this Court proscribed in *Crocker v. U. S.*, 240 U. S. 74, 78; 50 L. Ed. 533; and in *U. S. v. Pyne*, 313 U. S. 127, 130; 61 L. Ed. 893, 895; followed in *City of Goldfield v. Roger*, 249 Fed. 39; *Highway Trailer Co. v. Des Moines*, 298 Fed. 71; *Lahman v. Burnes National Bank*, 20 Fed. (2d) 897; and applied directly to the Tax Court in *Kendrick Coal & Dock Co. v. Commissioner*, 29 Fed. (2d) 559, 564.

In failing to make such ultimate findings, the decision below is in direct conflict with section 1117(b), title 26 U. S. C. A.; 53 Stat. 161, amended October 21, 1942, c. 619, Title V. section 504(a)(c), 56 Stat. 957.

On this point alone the decision below should be reversed.

#### 4. Using Losses as a Test.

If the repeated references to losses, in the decision below, were intended to relate to the issue under section 23(a)(2) they are immaterial under *Bingham's Trust, supra*. The Court below has so confused the two issues it is difficult at times to determine which section it was considering.

If such references were directed toward section 23(a)(1) as farming business losses, they still are immaterial under the plain provisions of the Commissioner's own regulations. Section 29.23(a)15, fifth sentence, Regulations 111. (R. 2a). *Thacher v. Lowe*, 288 Fed. 994, cited in the Tax Court's decision, has no relation because, as the Commissioner pointed out in G. C. M. 21,103, in 1939-1 C. B. 164, dealing with all of the "pleasure" farming decisions, in the *Thacher* case the only evidence submitted was a statement of receipts and losses. See *Cooke v. Commissioner*, 78 Fed. Supp. 519. The decisions cited by the Court below related to voluntary farming ventures. The activities involved here were compulsory and there was no alternative or option.

### 5. Substitution of Speculation for Fact.

As lately as October, 1947, Circuit Judge Kalodner, who sat in the present case, for the CCA-3 issued a decision which reversed the Tax Court for indulging in the very practice engaged in here. *In Re: Leuders' Estate*, 164 Fed. (2d) 128. He referred to a curious series of deductions, which in view of the record itself, failed to attain the dignity of factual inferences and could only be described as "hunches;" stating that there was not a single discernable statement in the record to support many of the Tax Court's reasonings; that while that Court had a choice as between conflicting factual inferences and conclusions considered most reasonable it was well settled that speculation cannot be substituted for proof (quoting from *Galloway v. U. S.*, 319 U. S. 372), and that this particularly is true where the speculation is unfavorable to the taxpayer, citing *Van Worst, Exec. v. Commissioner*, 22 B. T. A. 632, affirmed in 59 Fed. (2d) 677.

Another recent occasion where the Circuit Court of Appeals (6th) reversed the Tax Court for indulging in inferences and suppositions contrary to the clear evidence in the record, is *Kent v. Commissioner*, (September, 1948) 170 Fed. (2d) 131, 136-7; quoting the phrase used in *Lawton v. Commissioner*, 164 Fed. (2d) 383: " \* \* \* out of such gossamer threads of circumstance that the findings and conclusions of the Tax Court are woven \* \* \* ", and citing this Court's discussion of "substantial evidence" in *Consolidated Edison Co. of New York v. N. L. R. B.*, 305 U. S. 197, 198; 59 S. Ct. 206, 217; 83 L. Ed. 126 and many other cases.

In the face of the direct evidence that the Estate representatives felt they had a responsibility to keep up the property as best they could in the condition in which they received it and regardless of its character; (R. 29a) the rule of law that holds executors and trustees responsible for such care or surchargeable should they not exercise it;

the fact that everything remained as prior to decedent's death except for retrenchment in expense; (R. 28a) and the specific directions of the will that the tax entity should incur the expenses; (R. 18a) the Court below speculated upon the executors "moving on to property" (R. 14a) where they always had been, and inferred the motive was to indulge in pleasures or hobbies (R. 16a) which are not permitted executors,—all without that "scintilla" of evidence referred to in *Consolidated Edison, etc., supra*. It inferred an ulterior personal motive and intention to individuals who had no discretion or option in their fiduciary capacity. It disregarded entirely the presumption that official acts or duties have been properly and legally performed, which presumption was recognized in the Tax Court's very first decision. *Parrott v. Commissioner*, 1 B. T. A. 1, affirmed in *Noel v. Parrott*, 15 Fed. (2d) 669; see also 31 C. J. S., section 146(a) and 146(c).

The holding here is contrary to the holding of the same CCA-3 in *Chandler v. Commissioner*, 119 Fed. (2d) 623, 625, stating as the fundamental principle underlying all fiduciary relationships that fiduciaries may not have personal dealings with the property held by them,—citing Restatement, Trusts, section 170 and comments thereto. In this *Chandler* decision, the CCA-3 held that the existence of separate legal entities seldom is ignored in tax matters and that it may not be presumed that corporate directors have given away as a gratuity a valuable right to use corporate property. 119 Fed. (2d) 626, 627. Ordinarily such action would be beyond their power,—citing *Noel v. Parrott, supra*.

The Tax Court here went to the extreme in finding (in its opinion) several facts as to use of certain facilities as to which there is not a solitary word or figure of evidence in the record. (R. 15a). It stated in the opinion there was no segregation of expenses, (R. 16a) when it already had found the segregation in detail in its own Findings of Fact. (R. 11a).

In so doing the Court below acted contrary to law and sufficiently so to warrant setting aside its findings. *Foran v. Commissioner*, CCA-5, January 20, 1948, in 165 Fed. (2d) 707, citing *Greene v. Commissioner*, 141 Fed. (2d) 645, 646. See also *Charles P. Tatt v. Commissioner*, CCA-5, at 166 Fed. (2d) 697.

### CONCLUSION.

It is submitted that the decision of the United States Circuit Court of Appeals for the Third Circuit should be reversed, and that, to such end, a writ of certiorari should be granted and your Court review the said decision.

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